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Nos. 85-1658 and 85-1660

In The
Supreme Court of the United States
October Term, 1986

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellants,
v.
FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,
v.
FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. An independent Board of Trustees authorizes participation in a case only when it concludes that PLF's position has broad public support. The Board of Trustees has authorized the filing of this brief.

PLF believes that clear standards for determining what constitutes a "taking" will benefit property owners, regulatory agencies, and the courts alike. When people know with certainty what their rights are, and what the rules are, disputes can be resolved outside of the courtroom. In very recent years this Court has issued certain opinions, including *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which go a long way towards clarifying the law in this area. PLF believes it is in the public interest to preserve these precedents without qualification or equivocacy.

PLF's public policy perspective in support of private property rights will help provide this Court with a more complete briefing of the interests at stake in this litigation.

SUMMARY OF THE ARGUMENT

Although the facts of this case differ from *Loretto v. Teleprompter Manhattan CATV Corp.*, in that the cable attachments herein were originally agreed to, once the government modified the terms of the agreement the relationship between the parties became identical to *Loretto*. Since the lawsuit seeks a determination of the parties'

rights after their relationship was altered by the government's intervention, *Loretto* should control.

If, however, the Court holds *Loretto* inapplicable, because the cable attachments herein were originally agreed to, this only means the mandatory provision of pole space is not a "taking" per se. The Court must then consider whether the drastic reduction in the rates that may be charged for pole space is nonetheless a "taking" due to its interference with reasonable investment-backed expectations.

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ARGUMENT

I

THE RULE THAT PHYSICAL OCCUPATION IS A "TAKING" PER SE SHOULD APPLY EVEN THOUGH THE OCCUPATION WAS ORIGINALLY INVITED

Appellants (cable operators) would distinguish this case from *Loretto v. Teleprompter Manhattan CATV Corporation* on the ground that appellees (utility companies) willingly allowed access to their poles, whereas the New York law under review in *Loretto* mandated access. *See* brief of appellant cable operators at 28; brief of Federal Communications Commission (FCC) at 14-15. The argument is based upon the principle that a person's rights are not violated if he voluntarily waives them. *See, e.g., Wyrick v. Fields*, 459 U.S. 42 (1982) (waiver of right to counsel); *Oregon v. Elstad*, — U.S. —, 105 S. Ct. 1285 (1985) (waiver of right against self-incrimination).

In the civil no less than in the criminal area the focus is upon voluntariness, and courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 307 (1937). Indeed, courts must "indulge every reasonable presumption *against* waiver." *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (emphasis added); *Aetna Insurance Company v. Kennedy*, 301 U.S. 389, 393 (1937). The Court should not assume that an agreement to carry cables at the prevailing market rate remains voluntary after the government drastically alters the terms of the contract. The very fact that the utility companies have sued shows that they are unwilling to continue the arrangement under the government's terms. Where continued physical occupation of private property is forced upon an unwilling owner by the government, the owner's hardship is just the same as if the occupation were being forced upon the owner for the first time. In fact, the occupation *is* being *forced* upon the owner for the first time.

Loretto is sound law and should not be diluted by an exception for physical invasions which were originally invited. The utility companies' "taking" claim is against the government, not the cable operators. The relevant inquiry, therefore, is not: what happened between the utility companies and the cable operators. Rather, the relevant inquiry is: what happened between the utility companies and the government. It is the situation resulting after the government's intervention that is pertinent, and that situation is identical to *Loretto*. Therefore, the *Loretto* rule should apply.

II

IF AN INVITED OCCUPATION IS NOT A "TAKING" PER SE, THE COURT MUST DETERMINE WHETHER CONTINUED OCCUPATION IS NONETHELESS A "TAKING" UPON THE FACTS OF THE CASE

When the interference with property can be characterized as a physical invasion, such that it constitutes a "taking" per se, this simply avoids the need for the " 'ad hoc factual' inquiry" customarily undertaken to determine whether a "taking" has occurred. *See Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1005 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). If occupation of the utility poles in the case at bar is not considered a physical invasion, because the occupation was originally invited, this Court must still consider whether the government has nonetheless effected a "taking" by substantially interfering with reasonable investment-backed expectations. *Monsanto*, 467 U.S. at 1005.

While it may be true that some of the contracts between cable operators and utility companies were entered into after the enactment of the Pole Attachments Act, 47 U.S.C. § 224, in 1978, at least two of those contracts were executed prior to the Act.[1] Since pole attachment rates were then unregulated, and the utility companies were under no obligation to provide space on their poles for cable operators, the utility companies were justified

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[1] The contract between Florida Power Corporation and Cox Cablevision Corporation was executed in 1963. The contract between Florida Power Corporation and Teleprompter Southeast, Inc., was executed in July, 1977. *See Florida Power Corporation v. Federal Communications Commission*, 772 F.2d 1537, 1539, 1541 (11th Cir. 1985).

in relying upon the terms of their contracts in exchange for allowing the cable operators access. Thus, the contracts formed the basis of a reasonable investment-backed expectation. The expectation was "reasonable" because the terms of the contracts were enforceable. If breached, the utility companies could have recovered damages at law, and a writ of ejectment in equity. The expectation was also "investment-backed." Pole space is limited and the briefs of the parties reveal occasions when utility companies leased space to cable operators which they later needed for their own wires, and consequently had to construct additional carrying facilities. *See, e.g.,* Motion to Affirm, filed by intervenor utility companies, at 11-13.

A case on point is this Court's decision in *Ruckelshaus v. Monsanto Company*, 467 U.S. 986. In that case the Court found no reasonable expectation that the Environmental Protection Agency would keep Monsanto's product formulas confidential when the Federal Insecticide, Fungicide, and Rodenticide Act authorized their disclosure. However, the Court did find a reasonable expectation at an earlier point in time when the Act did not authorize disclosure. The disclosure of formulas submitted during that period of time was held a "taking" of Monsanto's trade secrets.

Similarly, in the case at bar, the utility companies had reasonable investment-backed expectations, at least as to those contracts entered into prior to the Pole Attachments Act, when the law guaranteed enforcement of such contracts. The FCC's frustration of those expectations constitutes a "taking."

The cable operators argue that the utility companies' expectation of getting what they contracted for was not

"reasonable" because the utility companies know theirs is a regulated industry. *See* brief of appellant cable operators at 29. But whether a utility company is subject to rate regulation is determined by reference to the service it is selling, not simply the identity of the company as a "public utility."

> "The character of the *service*, that is, whether *it* is public or private, and not the character of the ownership, determines ordinarily the scope of the power of regulation . . . ." *Van Dyke v. Geary*, 244 U.S. 39, 44 (1917) (emphasis added).

The service here, space on poles which are the utility's private property, is not a service marketed to, or needed by, the general public. Thus, the fact that utility companies are regulated in the rate they may charge consumers for electricity does not mean that utility companies are unjustified in relying upon private contracts for the lease of pole space. Pesticide manufacturing is another regulated business, and so is rental housing in New York. Yet this Court did not hold in *Ruckelshaus v. Monsanto Company* that Monsanto should have anticipated governmental disclosure of its trade secrets just because it belongs to a regulated industry. And in *Loretto v. Teleprompter*, this Court did not rule that Mrs. Loretto must have purchased her building anticipating that she could be required to provide access to cable operators at only $1 per attachment just because New York rental housing is a regulated industry. Accordingly, this Court should not rule that the utility companies herein should have anticipated regulation of pole attachment rates. Rather, this Court should hold that the utility companies had a reasonable investment-backed expectation which could not be taken without compensation.

CONCLUSION

The rule that a government-authorized physical invasion is a "taking" per se should not be qualified by an exception for invasions that were originally invited. Such an exception would be based on a presumption of voluntariness which defies the facts and belies the Court's duty to indulge every reasonable presumption *against* the waiver of fundamental rights. Moreover, it is irrelevant that the invasion was invited prior to governmental intervention, since the "taking" claim complains solely about the situation after governmental intervention.

If the Court were to decide, however, that this was not a physical invasion, it would still need to consider whether it was a "taking" just the same for having substantially interfered with reasonable investment-backed expectations. Enforceable contracts made in the absence of regulation give rise to reasonable investment-backed expectations, which expectations are property rights that cannot be taken without just compensation.

For the preceding reasons the decision of the Eleventh Circuit Court of Appeals should be affirmed.

DATED: August, 1986.

Respectfully submitted,

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